STATE OF MICHIGAN

COURT OF APPEALS

KRISTEN MICHELLE GITTLER also known as KRISTEN MICHELLE STEENHOVEN,

Plaintiff-Appellee,

v

NICHOLAS PAUL GITTLER,

Defendant-Appellant.

UNPUBLISHED
September 23, 2021

No. 356034
Kalamazoo Circuit Court
LC No. 2016-005294-DM

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Defendant-father appeals by right the trial court order removing plaintiff-mother's safety restrictions and providing that the parties' minor child, PG, attend school while in plaintiff's care. Because we are bound by the applicable standards of review, we affirm in part and reverse in part.

I. BASIC FACTS

Plaintiff filed for divorce in 2016. The judgment of divorce provided that the parties would share joint legal and physical custody of PG. After the parties had agreed to the terms of the judgment of divorce, but before it was entered, defendant moved the trial court to amend the parenting-time agreement because Children's Protective Services was investigating plaintiff on the basis of her having homicidal thoughts about PG. The trial court ordered safety restrictions for plaintiff's parenting time, including that a door alarm be placed on PG's bedroom door. Plaintiff lived with her parents, and the trial court ordered that plaintiff's parents not leave PG alone with plaintiff. The trial court additionally ordered plaintiff to take all of her prescribed medications.

The present dispute arises out of defendant's motion to change custody and parenting time in order for PG to attend kindergarten and plaintiff's motion to lift safety restrictions that were in place during her parenting time with PG. At an evidentiary hearing on the parties' motions, plaintiff testified that she had been diagnosed with obsessive compulsive disorder (OCD), post-traumatic stress disorder, and dysthymia, or long-term depression. Plaintiff was last hospitalized at the end of 2017, which was nearly three years earlier. Plaintiff testified that she did not pose

any threat to herself or PG. She stated that she had reported her ideations to medical providers despite knowing that it would be reported to the court in order to ensure that she was safe for herself and PG. She added that she had had intrusive thoughts about suicide since 2019, but she had not had any ideation or planning, and no homicidal ideation was reported. Plaintiff testified that she had a good support system and more coping skills than she had in 2017. She was taking lithium, which she found was helpful. She also returned to college in January 2018 and was working toward her bachelor's degree in mechanical engineering.

Plaintiff admitted that she stopped taking her medication at the end of 2017 before beginning to take it again at the end of 2018. Plaintiff had stopped taking her medication despite the safety plan requirement because her mother, who was a nurse, told her that she was overmedicated and because of the side effects that she experienced. Plaintiff thought that her counselor, Laura Kellicut, and nurse practitioner in psychiatry, Amy Reed, were helpful. Plaintiff testified that her medical providers were now listening to her concerns about her medications, so the medications were no longer an issue. Plaintiff articulated that she understood why the safety plan had been put into place at the time, but she did not believe it remained necessary. Plaintiff thought that she had not "been able to fully parent" PG because of the safety plan.

Kellicut, plaintiff's counselor, testified that she met weekly with plaintiff. Kellicut had no concerns about plaintiff being alone with PG or her ability to parent him. She opined that plaintiff was "stable" and experienced stress from normal life events, and she explained that she worked with plaintiff to address plaintiff's OCD and intrusive thoughts.

The parties each testified that it was in PG's best interests to attend kindergarten that fall. Plaintiff testified that she wanted PG to attend Comstock STEM Academy because it had small classes, individualized instruction, project work, and more resources. Plaintiff thought that Comstock STEM was a good fit for PG because he had shown aptitude in STEM subjects.

Defendant testified that he was an engineer and worked from approximately 6:00 a.m. to 2:30 p.m. Defendant was working from home. He was also taking classes in the evenings for his mechanical engineering degree. Defendant was in the process of buying his home through a land contract and had no plans to move. Defendant married his wife in 2019 and had a daughter from a previous relationship who attended Jefferson Elementary, where he wanted PG to attend because defendant saw how the staff worked "with and for the child." Defendant thought that the percentage of students at Jefferson Elementary who spoke different languages was a benefit for PG, as diversity was good for children. Defendant did not think it was necessary to focus on science or math at that point because he did not want to "shoehorn" PG in one academic direction, even though PG was a bright child.

Defendant testified that PG and his half-sister were close. Defendant did not have any issues working from home while caring for his daughter and PG, or with helping his daughter with her schoolwork once school became virtual because of the pandemic. Defendant testified that he had flexibility at his work, so he could provide PG transportation or take extra time with him. Defendant paid for PG's health insurance through his employer and made sufficient income to support the family. Defendant added that he had a good relationship with PG and that they did activities like going to the park or involving PG with his sister's scout troop. He did most of the cooking for PG and read with him. Defendant testified that his parents, grandparents, and siblings

all lived nearby, and PG had good relationships with them. Defendant stated that plaintiff had only participated in two of PG's weekly exchanges that year. Defendant testified that plaintiff's safety plan was in PG's best interests because plaintiff's mental health affected her ability to parent.

With regard to his own mental-health issues, defendant testified that he had been diagnosed with bipolar II in 2015, but he no longer needed or took medication for it. Defendant admitted that he had shared posts online that referred to mental health in attempts to be empathetic with people or to be funny.

Following the evidentiary hearing, the referee found it was no longer necessary for plaintiff to be supervised when with PG or for PG to have an alarm on his bedroom door. The referee recommended that plaintiff continue to take her medications, follow her treatment providers' recommendations, and live with her parents. The referee found that it was in PG's best interests to attend STEM Academy. Defendant objected to the referee's recommendation, and the trial court held a de novo review hearing. Following that hearing, the trial court entered an order removing the safety restrictions, ordering PG to attend STEM Academy, and ordering that PG would reside primarily with plaintiff.

II. CUSTODY ORDER

A. STANDARD OF REVIEW

"Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014). Under the great-weight-of-the-evidence standard, this Court will affirm a trial court's findings of fact "unless the evidence clearly preponderates in the other direction." *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012).

B. ANALYSIS

1. REMOVAL OF SAFETY RESTRICTIONS

Defendant argues that it was against the great weight of the evidence for the trial court to remove plaintiff's safety restrictions and that the removal posed a substantial risk of harm to PG. We agree.

A trial court may only modify previous judgments or orders when there is "proper cause shown or because of change of circumstances." MCL 722.27(1)(c). When a modification will disrupt a custodial environment, a moving party must show an appropriate ground that will have a significant effect on the child's life. *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). If a modification will not change the established custodial environment, normal life changes can warrant modification, *Shade v Wright*, 291 Mich App 17, 30-31; 805 NW2d 1 (2010), and the "lesser, more flexible understanding of 'proper cause' or 'change in circumstances' " applies, *Kaeb v Kaeb*, 309 Mich App 556, 570-571; 873 NW2d 319 (2015). A condition that was once in the child's best interests may not be in that child's best interests at another point in the

child's life. *Id*. at 571. "[A] party establishes proper cause to revisit the condition if he or she demonstrates that there is an appropriate ground for taking legal action." *Id*. Once the moving party demonstrates proper cause or a change in circumstances, trial courts have the "authority to adopt, revise, or revoke a condition whenever it is in the best interests of the child to do so." *Id*. at 571-572.

Here, plaintiff demonstrated proper cause or change of circumstance through the evidence presented about her improved mental health and the impact that the restrictions had on her ability to parent PG. See *id*. at 572-573. Plaintiff and her mother testified about the improvements that plaintiff had made since the plan was implemented. Plaintiff had been seeing Kellicut, her counselor, since April 2019, and Kellicut testified that she had no concerns about PG's safety when with plaintiff. Plaintiff and Kellicut testified about plaintiff's increased support system and coping mechanisms. Plaintiff testified that she had a good medical team and that her medical providers listened to and addressed her concerns. Because of plaintiff's mental health improvements, there was proper cause for the trial court to consider removing the restrictions.

However, the trial court's finding that the removal of the restrictions was in PG's best interests was against the great weight of the evidence. The first concern is always the welfare of the child. See *Heid v Aasulewski*, 209 Mich App 587, 595; 532 NW2d 205 (1995). Here, the safety plan was put into place because plaintiff had thoughts of killing herself and murdering PG. Although the safety plan required a door alarm on PG's door and required plaintiff to continue to take her medication as prescribed, the record reflects that—with input from plaintiff's mother—plaintiff stopped taking her medication in 2017. Moreover, contrary to the safety plan, plaintiff's mother opted to remove the door alarm. Although the alarm was returned and although plaintiff eventually began to take medication as prescribed, her failure to comply with the plan—especially as it relates to her mental health—is evidence that she may again opt not to follow medical advice. The record also reflects that plaintiff continues to have intrusive thoughts. She contends that there is no danger to herself or PG because she does not have any ideation or planning associated with those thoughts. However, we remain acutely aware that plaintiff nevertheless has chosen not to take prescribed medications based on her mother's belief that such medications are unnecessary. Her mother, although a nurse, is not one of plaintiff's medical providers and, although she is a nurse, she was not one of the medical providers tasked with managing plaintiff's medication. In sum, given that plaintiff has expressed thoughts of slitting PG's throat in the past, and given that she has also demonstrated a willingness to discontinue her medication on the advice of her mother and without consulting her mental-health professionals, we conclude that the court's finding that removal of the safety restrictions was warranted is against the great weight of the evidence.

2. SCHOOL ENROLLMENT

Defendant argues next that the trial court erred by failing to evaluate the school enrollment pursuant to the best-interest factors. We disagree.

When parents with joint custody are unable to agree on a child's education, the trial court has the authority to determine the issue in the best interests of the child. *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). "[T]he best-interest factors are geared toward general custody determinations, and many of these factors are simply irrelevant to particular 'important decisions' affecting the welfare of the child." *Pierron v Pierron*, 486 Mich 81, 90; 782

NW2d 480 (2010) (*Pierron II*). Thus, "although the trial court must determine whether each of the best-interest factors applies, if a factor does not apply, the trial court need not address it any further." *Id*. at, 486 Mich at 93.

In this case, the trial court addressed each and every best interest factor. And, when those factors were relevant to the determination of which school it would be in PG's best interests to attend, the court briefly addressed the relevant facts and argument. In its best-interest analysis, the court noted that it had gone through the exhibits and heard the testimony related to both parties preferred schools. It recognized that both schools "seem to be good schools." However, it concluded that "[l]ooking at all the factors, I think, I believe the evidence shows that Comstock Stem Academy would be best." In particular, the Court noted that Comstock Stem Academy would offer PG "an opportunity to excel" and it held that "what the Stem Academy from Comstock offers moves me to clear and convincing evidence that the child's going to do better at—at Comstock." The record reflects that the teaching was individualized at Comstock, that the classrooms had small sizes, and that the school had numerous resources. Additionally, defendant testified that the curriculum at Comstock offered more time for STEM[1] work per day. Although there was also evidence that Jefferson Elementary would be a good school for PG, the trial court concluded that "this is about a 52/48 split" and the evidence that one school or the other would be better was "not overwhelming one way or the other." The fact that, ultimately, the court found that it would be in PG's best interest to attend Comstock STEM based on what that school offered was not a finding that is against the great weight of the evidence. Additionally, as relevant to the school decision, the trial court found that plaintiff provided stability for PG and that she would be able to safely raise and support PG as he attended kindergarten.[2] Therefore, based on the record before this Court, and in consideration of the standard of review, we conclude that the trial court did not err by finding that it was in PG's best interest to attend school in Comstock.

3. PRIMARY RESIDENCE

Finally, defendant argues that the trial court's finding that it was in PG's best interests to primarily reside with plaintiff was against the great weight of the evidence. We disagree.

A trial court must resolve custody disputes by determining what is in the child's best interests as provided in MCL 722.23. The trial court must consider each factor and explicitly state its findings regarding the factor. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). However, the trial court is not required to discuss every matter in evidence. *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1982). The trial court is also not required to give

[1] STEM refers to science, technology, engineering, and mathematics.

[2] We find no merit to defendant's contention that the court's finding was not supported by clear and convincing evidence because the court only found the differences in the school to be "52/48." The clear-and-convincing evidentiary standard does not require overwhelming evidence. Rather, this Court will affirm factual findings "unless the evidence clearly preponderates in the other direction." *Mitchell*, 296 Mich App at 519. Here, given the closeness of the issue, we are not convinced that the evidence *clearly* preponderates in the other direction.

equal weight to each of the factors. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

A trial court may not modify a custody order that changes an established custodial environment without clear and convincing evidence that it is in the best interests of the child. *Pierron II*, 486 Mich at 92. If the change to physical custody "will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Id*. at 86.

Although defendant argues that the trial court did not specify whether the modification affected the established custodial environment, the trial court explicitly applied the clear and convincing evidence standard and found that it was in PG's best interests to attend school, to which both parents agreed. Further, given that the court applied the clear-and-convincing standard, it is apparent that it found the change would alter PG's custodial environment. See *id*. at92.

Defendant also challenges the court's findings on Factors (b), (c), (d), (e), and (g), arguing that each is against the great weight of the evidence. We address each argument in turn.

Defendant argues that the trial court did not properly consider plaintiff's inability to care for PG without her parents' assistance when weighing Factors (b) and (c). However, plaintiff testified that she got PG ready in the morning and spent evenings with him and plaintiff's mother testified that she and her husband were "just the sidekick." Further, their presence was required by the safety plan. There was no evidence that plaintiff was unable to provide that care for PG absent her parents' supervision or that they ever had to step in to provide for PG because plaintiff could not. Although plaintiff's father seemingly provided most of the transportation, his participation was required by the safety plan, and plaintiff testified that she stayed home to take care of things for her father or because he could not return home after dropping off PG. There is no indication that plaintiff could not provide transportation for PG were the safety plan removed. Additionally, although defendant alleges both that "the only time [plaintiff] spends with the child" is in the morning and evening and that she relied on child support, food stamps, government assistance, and her parents for financial assistance, and defendant earned more money than plaintiff, there was no indication that plaintiff had ever failed to provide for PG or that her decision to send PG to preschool was for any other reason than to obtain her degree and provide for PG.

Defendant additionally argues that the trial court did not properly consider plaintiff's intent to move when weighing Factors (d) and (e). Yet, although plaintiff discussed moving eventually, plaintiff did not have a plan to do so in the near future, and there was no specific indication that the move would definitely occur. Plaintiff was not relying on her "parents' support to demonstrate her own family stability" as defendant argues, but, instead, evidence in the record showed that plaintiff was the primary caretaker for PG. Defendant argues that his position is supported by the Michigan Supreme Court's explanation in *Ireland v Smith*, 451 Mich 457, 466; 547 NW2d 686 (1996), where the Supreme Court noted that the stability of a party who relies on his or her parents for support is difficult to determine accurately because that party will not live with his or her parents forever. He also directs this Court to *Mogel v Sciver*, 241 Mich App 192, 200; 614 NW2d 969 (2000), where this Court noted that long-term stability may be problematic for a single parent, so it was appropriate to favor a traditional nuclear family over the support of grandparents who "would find that task increasingly difficult as they become older." Neither case, however, compels

a finding that a party's home is always less stable if a party receives support from his or her parents. Here, the court's finding that plaintiff's long-term living arrangement at her parents' home was stable for PG, and this finding was not against the great weight of the evidence.

Next, defendant argues that the trial court did not properly consider plaintiff's mental health conditions when weighing Factors (b), (d), and (g). However, the trial court explicitly considered plaintiff's mental health as it related to custody and stated that there was no evidence that it affected her ability to parent PG. The evidence showed that plaintiff was regularly involved in counseling with Kellicut, had shown improvement, and that Kellicut had no concerns about plaintiff being with PG. Further, plaintiff was meeting with Reed to discuss her medication and had been compliant with her medication, and plaintiff's friend testified that she had no concerns about plaintiff's parenting on the basis of her observations of PG and plaintiff's interactions. See *Riemer v Johnson*, 311 Mich App 632, 645; 876 NW2d 279 (2015) (holding that the court's finding was not against the great weight of the evidence when there was evidence that the defendant was mentally healthy at the time of the trial).

Finally, defendant argues that there was not clear and convincing evidence that the custody modification was in PG's best interests. As previously discussed, both parties agreed with the trial court that it was in PG's best interests to attend school. This required a choice between schools. The trial court explicitly considered each of the best-interest factors and the proposed schools before determining that it was in PG's best interests to attend Comstock STEM and reside primarily with plaintiff. Although defendant argues that the trial court's ruling did not "rise to the level of clear and convincing evidence," this Court has held that in situations in which parties are equal or nearly equal under the best-interest factors, that equality does not necessarily prevent a party from "satisfying the clear and convincing standard of proof." *Heid*, 209 Mich App at 594. Therefore, the trial court did not abuse its discretion by finding that it was in PG's best interests to reside primarily with plaintiff.

Affirmed in part and reversed in part. Neither party having prevailed in full, no taxable costs are awarded. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

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MURRAY, C.J. (*concurring in part, dissenting in part*).

I concur with the majority's opinion affirming the trial court's decisions with respect to the custody and school issues, but for the reasons briefly outlined below, respectfully dissent from its decision to reverse the court's decision to eliminate most of the safety restrictions.[1]

The majority concludes that the trial court's decision to lift the safety restrictions was against the great weight of the evidence. " 'Against the great weight of evidence' was defined by *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). The Court explained that a reviewing court should not substitute its judgment on questions of fact unless they 'clearly preponderate in the opposite direction.' The court should review 'the record in order to determine whether the verdict is so contrary to the great weight of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial....' " . *Fletcher v Fletcher*, 447 Mich 871, 885-888; 526 NW2d 889 (1994). Because this standard of review is deferential to the trial court's findings, *Pierron v Pierron*, 486 Mich 81, 95; 782 NW2d 480(2010) (CORRIGAN, J., concurring), this Court "may not substitute [its] judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *McKimmy v Melling*, 291

[1] The court continued the requirement that plaintiff and the minor child reside with her parents and gave discretion to plaintiff's parents (the homeowners) as to the location of the minor child's bedroom. Removed were the requirements of a door alarm on the child's bedroom door and that plaintiff and the child be supervised.

Mich App 577, 581; 805 NW2d 615 (2011), citing *Rittershaus v Rittershaus*, 273 Mich App 462, 472-473; 730 NW2d 262 (2007).

There were sufficient facts in the record supporting the trial court's conclusion that most of the safety restrictions were no longer necessary, as the facts do not clearly preponderate in the opposite direction. In support of the trial court's finding was plaintiff's testimony about the status of her mental health, the fact that she had found medical professionals whom she felt were helpful, her ability to better manage and balance her life, and her continued educational efforts. Also supporting the trial court's decision was the testimony of Kellicut, a licensed professional counselor, whom plaintiff has been seeing on a weekly basis since April 2019. Kellicut testified that plaintiff no longer needed safety restrictions when taking care of the minor child. Additionally, as the court noted, the minor child was now four years older than when the restrictions were adopted, and the child was more capable of raising concerns to others.

Given that the trial court heard all the testimony, found plaintiff to be honest about her situation and improvements, and given that there were several other pieces of evidence supporting the trial court's finding, I am hard-pressed to conclude that the findings were against the great weight of the evidence. Certainly, there was other evidence—pointed out by defendant on appeal—that could have led the trial court to keep the restrictions in place, but that is not the test we are to apply. One may be able to arrive at a different conclusion when reviewing the same facts, but under this standard of review, we cannot substitute our judgment for that of the trial court when sufficient facts support its conclusion. I would affirm *in toto*.

/s/ Christopher M. Murray